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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-1807

LARRY AULT,
Petitioner,

v.

STATE OF GEORGIA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

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I N D E X

TABLE OF AUTHORITIES

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QUESTIONS PRESENTED

1.

Whether Ga. Code Ann. § 79A-1105 is constitutional in providing that the State is not required to negate any exception or exemption contained in the Georgia Controlled Substances Act.

2.

Whether the application of Georgia Code Ann. §79A-1105 by the trial court in the case at bar was constitutional under the Fourteenth Amendment.

STATEMENT OF THE CASE

Petitioner was indicted by the Superior Court of Whitfield County, Georgia, in 1977 on two counts of violation of the Georgia Controlled Substances Act by selling amphetamines and chloral hydrate. (R. 4-5). At trial, Georgia Bureau of Investigation agent Mark Lengel testified that Petitioner, Larry Ault, sold controlled substances to him on two separate occasions. (T. 30-41). Petitioner's defense was that a girl with him actually did the selling. (T. 86, et. seq.). Petitioner testified that he knew the sale was taking place, but that he did not participate. At no time did Petitioner assert that he was authorized to make the sales.

At the conclusion of the testimony, the trial court thoroughly charged the jury on reasonable doubt and the presumption of innocence. (T. 116). As Petitioner had not raised a defense of being authorized to sell controlled substances, the court further charged as follows:

> "I charge you that, except as authorized by the Georgia Controlled Substances Act, it is unlawful and it is a felony for any person to sell any Controlled Substance. I charge you that this defendant does not come within any exception authorized by the Georgia Controlled Substances Act."

(T. 120). Petitioner did not object to the charge.

The jury returned a verdict of guilty on both counts on December 14, 1977. (T. 122).

Petitioner was sentenced on December 15, 1977.

Petitioner filed a motion for new trial on January 6, 1978, in which the issues presented to this Court were raised. (R. 51-53, 67-73). Petitioner's motion was overruled by the trial court on August 23, 1978. (R. 77).

On September 19, 1978, Petitioner filed a notice of appeal to the Georgia Court of Appeals. (R. 1,2). The two issues raised in the present petition were presented to the Court of Appeals. On January 11, 1979, the Court of Appeals affirmed Petitioner's convictions, holding in part:

> "The burden of proof negativing the state's allegation that defendant was not authorized under any provision of the Georgia Controlled Substances Act to sell certain substances is on the defendant. Code Ann. § 79A-1105. The constitutionality of this statute has been upheld and it was not repealed by Code § 26-501."

Ault v. State, 148 Ga. App. 761, 763, 252 S.E.2d 668 (1979), citing Woods v. State, 233 Ga. 347, 211, S.E.2d 300 (1974).

Petitioner's motion for rehearing was denied on January 25, 1979. The Supreme Court of Georgia denied the application for certiorari on March 7, 1979. A petition for a writ of certiorari was filed in this Court on June 4, 1979 to review the decision of the Court of Appeals of Georgia.

Further facts will be discussed as necessary for a more thorough illumination of the issues raised by the present petition.

REASONS FOR NOT GRANTING THE WRIT

A. THE COURT OF APPEALS OF GEORGIA PROPERLY UPHELD THE CONSTITUTIONALITY OF GEORGIA CODE ANNOTATED § 79A-1105, AS IT DOES NOT IMPROPERLY SHIFT THE BURDEN OF PROOF TO A DEFENDANT.

Petitioner alleges that Ga. Code Ann. § 79A-1105 creates an unconstitutional presumption that is violative of the due process clause of the Fourteenth Amendment of the United States Constitution. Petitioner asserts that before the selling of a controlled substance can be a crime it must fall outside of the exception. Petitioner therefore asserts that the statutory requirement does not meet the test for presumptions set out by this Court in Tot v. United States, 319 U.S. 463, 467 (1942) and subsequent cases. Petitioner further asserts that this provision violates the holding of this Court in Mullaney v. Wilbur, 421 U.S. 684 (1974) by being impermissibly burden shifting and negating the facts of the crime. Respondent submits that the statute in question does not impermissibly shift the burden to the defendant and is not violative of the United States Constitution.

Petitioner was convicted of violations of the Georgia Control Substances Act. The prohibited acts are set out in Ga. Code Ann. § 79A-811.

The violation in the case at bar is set out in § 79A-811(b):

> "Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, distribute, dispense, administer, sell or possess with intent to distribute any controlled substance."

Ga. Code Ann. § 79A-1105 provides as follows:

> "In any complaint, information or indictment charging any violation of any provision of this Title, and in any action or proceedings brought for the enforcement of any provision of this Title, it shall not be necessary to negative any exception, excuse, proviso or exemption contained in this Title, and the burden of proof of any such exception, excuse, proviso or exemption shall be upon the defendant."

Similar statutes exist in several states as well as in the United States Code. In United States ex. rel. Kirchner v. Johnstone, 554 F. Supp. 14(E.D. Pa. 1978), the Pennsylvania District Court considered a similar provision in the Pennsylvania Code in its relationship to the case where, as in the case at bar, no evidence was presented by the prosecution that the defendant did not fall within a statutory exception. The court noted that the key question was whether the exception was an essential element of the crime. The District Court went on to note that

the Pennsylvania courts had interpreted the provision as not being an element of the crime but as a personal defense.

> "The exemption clauses in those sections do not refer to conduct, i.e., to essential elements of the crimes (possession, sale, manufacture, or delivery), but to persons who are to be exempted (persons 'registered under this Act'). Thus, the exemption applies if the accused has obtained a certain status; it has nothing to do with the conduct that would constitute a crime if performed by someone else. Status does not constitute an essential element of the crimes, rather it only provides a personal defense. Thus the burden of proving it can be constitutionally shifted to the person claiming it."

(Emphasis in original). Kirchner, supra, at 17, citing Commonwealth v. Stawinsky, 234 Pa. Super. 308, 339 A.2d 91, 94-5 (1975). 1/

A similar statutory provision exists in the federal code at 21 U.S.C. § 885(a)(1), which provides that the United States is not required

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1/ Similar statutory provisions have also been upheld in Florida, Maryland and Michigan. Purifoy v. State, 359 So. 2d 446 (Fla. 1978); Moor v. State, 384 A. 2d 103 (Md. App. 1978); People v. Beatty, 78 Mich. App. 510, 259 N.W. 2d 892 (1977).

to negative an exemption or exception under that chapter. In United States v. Rowlette, 397 F.2d 475 (7th Cir. 1968), the defendants urged that the government was required to negative the exceptions and exemptions. The court held that if the defendant came within an exception or exemption in the statute, it was necessary for him to set up and establish it as a defense. See McKelvey v. United States, 260 U.S. 353, 357 (1922); United States v. Safeway Stores, 252 F.2d 99, 101 (9th Cir. 1958). The court held:

> "In our opinion the exceptions or exemptions specified in § 360a may, insofar as burden of proof is concerned, be equated with the affirmative defenses. Whether a defendant and his activity occupy an exempt status is a matter peculiarly within his knowledge and with respect to which he can be fairly expected to aduce the proof. The burden of proving the facts necessary to establish such an affirmative defense is upon the defendant."

Rowlette at 479.

In upholding the statute attacked in the case at bar, the Georgia Supreme Court has specifically stated that "Whether an individual has a license or is otherwise lawfully permitted to have in his possession narcotic drugs under Title 79A is a matter of defense and not an element of the offense." Woods v. State, supra, at 349. Thus, it is clear that under Georgia law the exceptions or exemptions to the prohibited acts of the Georgia Controlled Substances Act are affirmative defenses to be set forth by the

defendant and do not constitute elements of the offense to be proven by the State. Under Georgia law, it is not the "unlawful selling" that is a crime, but it is the selling of any controlled substance specified under the Act that constitutes a crime. Ga. Code Ann. § 79A-811(b). As a defense to this crime, once the State has proven the elements necessary to show the selling, the defendant can establish that he was authorized under the statutes to sell the controlled substance in question. The burden of going forward with the evidence can properly be placed on the defendant after the prosecution has "proven enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression." Speiser v. Randall, 357 U.S. 513, 524, (1958), quoting Morrison v. California, 291 U.S. 82, 88-89, (1933).

Respondent therefore submits that in the statute in question, there is no impermissible presumption created. Rather, the statute sets out the crime and then provides the defenses that are available by the defendant. As the Georgia Supreme Court has interpreted the statute as requiring the exceptions to be set out as defenses and not as elements of the crime, the statute is not unconstitutional in violation of the Fourteenth Amendment. Thus, the Georgia Court of Appeals properly upheld the constitutionality of the statute in question. Respondent submits that this Court should decline to review Petitioner's case as there is no impermissible presumption involved.

B. THE APPLICATION OF GEORGIA CODE ANNOTATED § 79A-1105 IN THE CHARGE OF THE TRIAL COURT WAS PROPER.

Petitioner asserts that by charging " . . . that this defendant does not come within any exception authorized by the Georgia Controlled Substances Act," the trial court violated Petitioner's Fourteenth Amendment rights. Petitioner asserts that this charge removed the requirement of the State proving every element of the crime.

Respondent has already shown that the "unauthorized" provision of the statute is an affirmative defense and, thus, is not an element of the crime that the State must prove. See Woods v. State, supra. Furthermore, the portion of the charge in question was not burden-shifting. The court merely noted that the defendant had not shown he was "authorized." As the defendant made no contention at trial that he fit within an exception or exemption, it was proper for the court to remove this point from the jury's consideration.

The Georgia courts have consistently upheld this type of charge.

> "While the trial court may not express an opinion as to what has been proved in the case . . ., where only one inference is possible from the evidence it is not improper for the court to assume the fact to be true. Morton v. State, 190 Ga. 792, 801 (10 S.E.2d 836). The general rule is that the selling of narcotics is a criminal offense, the exception

> being as to certain professionals who are licensed to handle and sell them. . . . The defendant made no contention that he was within this class [of persons], and the evidence demanded a finding that he was not."

Lyle v. State, 131 Ga. App. 8, 11, 305 S.E.2d 126 (1974), quoting Green v. State, 129 Ga. App. 27(2), 198 S.E.2d 343 (1973).

Respondent therefore argues that as the charge merely stated a finding that was demanded from the evidence, there was no error. Furthermore, the charge was not impermissibly burden-shifting because all elements of the crime were established by the State. The Court merely instructed the jury that Petitioner had not established the defense of "authorization." Thus, there is no merit to this issue raised in the petition for a writ of certiorari.

CONCLUSION

For the above and foregoing reasons, Respondent respectfully requests this Court to deny the petition for writ of certiorari filed on behalf of Larry Ault.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John C. Walden, Attorney of Record for the Respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief in Opposition for the Respondent upon the Petitioner by depositing three copies of same in the United States mail, with proper address and adequate postage to:

Mr. Steve K. Fain
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Attorneys at Law
P. O. Box 1678
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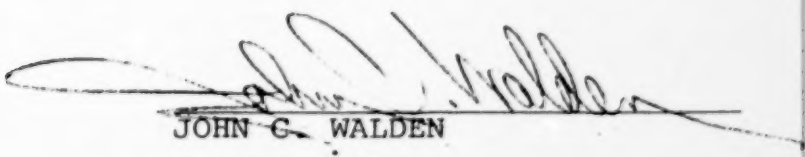
This 22nd day of August, 1979.



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